STATE OF MICHIGAN

COURT OF APPEALS

STUART SPRAGUE, BETTY JEAN CROUTEAU, JOYCE MARIE THOR and DONNA FARR, Plaintiffs-Appellees,	UNPUBLISHED March 18, 2003
v	No. 237399 Oakland Circuit Court
ANTONIO GOQUIOLAY, Defendant-Appellant.	LC No. 96-511049 - CH

Before: Cooper, P.J. and Murphy and Kelly, JJ.

PER CURIAM.

This case is before us for the second time. Defendant appeals as of right a bench trial judgment granting plaintiffs title to a disputed portion of property by adverse possession. We affirm.

I. Basic Facts and Procedural History

In 1948, plaintiffs' predecessors acquired what they believed, based on a survey and plat, to be lakefront property in Oxford, Michigan. Plaintiffs and their predecessors remained in continuous and exclusive possession of the property after 1948, and made numerous improvements. Plaintiffs gained full title to the property upon the death of their father in the early 1980s. Thereafter, the property was continuously used by plaintiffs through at least 1994, as a home and for recreational purposes.

In 1995, plaintiffs listed the property for sale. A potential buyer discovered that defendant, not plaintiffs, owned that portion of the property that abutted the lake. Defendant, who resides in the Philippines, had acquired the lakefront portion of the property in 1969.

Plaintiffs filed suit seeking to obtain title to defendant's property by adverse possession. In their complaint, plaintiffs contended that they and their predecessors had been in continuous and exclusive possession of the property since 1948. Defendant moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that plaintiffs' occasional trespass over the property was not sufficient to allow them to gain title to the property. Moreover, defendant contended that he had no actual knowledge of plaintiffs' use of the property until the lawsuit was commenced. In

response, plaintiffs contended that their occupation of defendant's property satisfied every element of adverse possession.

The trial court granted defendant's motion for summary disposition, but retained jurisdiction to resolve other issues, including the availability of an easement to ensure plaintiffs' continued access to the lake. This Court reversed the trial court's order granting summary disposition and remanded for further proceedings.[1]

After trial, the trial court placed its findings of facts on the record. The trial court found plaintiffs had used the disputed parcel in the following ways: built a barbecue pit or stove on the parcel; built steps on the parcel leading from the pit down to the lake; cleared and terraced the land; built a dock and a raft; fastened the raft to the dock and placed it in the water. Plaintiffs built a graded gravel driveway across their own land and extending onto the disputed property, ending in a parking area. Plaintiffs built a chain-link fence across one side of the disputed property and all the way to the lake, and posted a sign on it that read "private property, no trespassing." The fence and sign were put up to keep deer hunters off the property. Plaintiffs excavated a canal or inlet from the lake for boat storage and erected a fishing shanty that was used for ice fishing in the winter, and was stored on the property in warm weather. Only family members and invited guests used the disputed property. Defendant did not offer any testimony that the disputed property was not visible from the lake or from the parcels to the east and west.

The court then ruled that plaintiffs had met their burden of proving adverse possession by clear and convincing evidence, even when viewed in light of defendant's proofs. According to the court, there was no doubt that plaintiffs had actual possession of the parcel since the early 1950s, and the photos provided by plaintiffs from the 1950s, 1960s, and 1970s were "most convincing," especially because they were taken with no intention of influencing a lawsuit in 2001.

The court further found that plaintiffs' use was open and notorious to persons who were on the lake or who might have entered the land from adjoining parcels, as hundreds apparently did from time to time. The court held the fact that the property was not visible from certain other viewpoints did not mean that it was not visible. The court also found that the use was clearly exclusive and continuous for over fifty years, was hostile as shown by the no trespassing signs, and was done under a claim of title. Although the court acknowledged that defendant had never viewed plaintiffs' use of the disputed property, it found that defendant could have surveyed his property occasionally, and thus defendant had constructive notice under the doctrine of adverse possession. As a result, the court granted possession and title of the property to plaintiffs.

II. Standard of Review and Applicable Law

This Court reviews a trial court's findings of fact in a bench trial for clear error, and conclusions of law de novo. MCR 2.613(C); *Chapdelaine v Sochocki*, 247 Mich App 167, 169; 635 NW2d 339 (2001). A finding of fact is "clearly erroneous if, after a review of the entire

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[1] *Sprague v Goquiolay*, unpublished per curiam opinion of the Court of Appeals, issued April 21, 2000 (Docket No. 207428).

record, the reviewing court is left with the definite and firm conviction that a mistake has been made." *Ypsilanti Twp v General Motors Corp,* 201 Mich App 128, 133; 506 NW2d 556 (1993).

To establish adverse possession the claimant must show by clear and cogent proof that possession is actual, visible, open, notorious, exclusive, hostile, under cover of claim or right, and continuous and uninterrupted for the statutory period of fifteen years. *West Michigan Dock & Market Corp v Lakeland Investments,* 210 Mich App 505, 511; 534 NW2d 212 (1995), citing *Thomas v Rex A Wilcox Trust,* 185 Mich App 733, 736-737; 463 NW2d 190 (1990). The doctrine of adverse possession is strictly construed, *Strong v Detroit & Mackinac Railway Co,* 167 Mich App 562, 568; 423 NW2d 266 (1988), and the plaintiff has the burden of establishing the elements of adverse possession by clear and positive proof, *Burns v Foster,* 348 Mich 8, 14; 81 NW2d 386 (1957); *Killips v Mannisto,* 244 Mich App 256, 258; 624 NW2d 224 (2001). The true owner must have actual knowledge of the adverse possession, or alternatively, the possession must be so notorious as to raise the presumption to the world that the possessor claims ownership. *Ennis v Stanley,* 346 Mich 296, 301; 78 NW2d 114 (1956).

III. Constructive Notice

Defendant first argues that the trial court erred in finding that plaintiffs' use of the disputed property was open and notorious because the improvements and use of the property by plaintiffs were not openly visible to the public such that he could be charged with constructive notice. We disagree.

Plaintiffs presented evidence and testimony establishing that plaintiffs had: built a barbecue pit on the disputed parcel; built steps from the pit to the edge of the lake; cleared and terraced the land; and built a dock and a raft. There was also evidence that plaintiffs built a graded gravel driveway that extended across the disputed property, and ended in a parking area where family members often parked their cars. There was also evidence that plaintiffs had built a chain link fence across one side of the disputed property, extending it all the way down to the lake, and placed a no trespassing sign on it to keep deer hunters off the disputed property. Furthermore, there was evidence that plaintiffs erected a fishing shanty, which was used for ice fishing in the winter, and stored on the disputed property in warmer weather. We find no error in the trial court's ruling that plaintiffs' possession of the disputed property was so notorious as to raise the presumption to the world that plaintiffs claimed ownership. *Ennis, supra* at 301. Plaintiffs' acts were of such character as to indicate openly and publicly an assumed control or use consistent with the character of the disputed property. *Monroe v Rawlings,* 331 Mich 49, 52; 49 NW2d 55 (1951); *Denison v Deam,* 8 Mich App 439, 443; 154 NW2d 587 (1967).

As the trial court correctly noted, defendant's argument that plaintiffs' activities and improvements were not visible from certain positions or locations does not mean that they were not visible at all, and defendant presented no evidence that such was the case. Furthermore, the court also properly noted that although defendant claimed that he had never viewed plaintiffs' use of the land, he could have easily done so by simply visiting the property every so often. Plaintiffs' use of the disputed property was open and notorious, and thus gave defendant constructive notice that plaintiffs were claiming ownership of that property. Accordingly, the trial court did not err in granting judgment in favor of plaintiffs based on adverse possession.

IV. Permissive Use

Defendant further contends that because the disputed property was wild, vacant and undeveloped land, plaintiffs' activities on it, that were temporary and non-continuous, were permissive and cannot establish adverse possession. Although raised by defense counsel at trial, the record indicates that this issue was not directly addressed or decided by the trial court. Therefore, this issue is not properly preserved for appeal. *Camden v Kaufman*, 240 Mich App 389, 400 n 2; 613 NW2d 335 (2000). Notwithstanding defendant's failure to properly preserve this issue, we provide a cursory review.

In support of his argument, defendant cites *Du Mez v Dykstra*, 257 Mich 449, 451; 241 NW 182 (1932), for the proposition that the "tacit permission to use wild lands is a kindly act which the law does not penalize by permitting a beneficiary of the act to acquire a right in the other's land." However *Du Mez* is readily distinguishable from the present case. In *Du Mez*, the plaintiff landowners brought an action to enjoin trespass after defendant made claim to an easement by prescription over an undeveloped road that the defendant had used with the plaintiffs' express permission for fifteen years. *Du Mez, supra* at 450. Our Supreme Court held there was no evidence that the defendant's use of the road was hostile because it was the general custom of owners of wild lands, particularly logging roads over timberlands, to permit the public to pass over them without hindrance. *Id.* at 451.

To the contrary, plaintiffs brought the instant action to obtain title by adverse possession of property that was originally undeveloped land, but as previously discussed, was significantly improved upon in a number of ways by plaintiffs over several decades. Further, unlike in *Du Mez, supra*, defendant has offered no evidence in support of his theory that plaintiffs' use of the disputed property was permissive. There was no testimony indicating that defendant, or anyone else, gave plaintiffs permission to use the disputed property. In fact, the record indicates that the parties did not even know of each other's existence until at least 1996, when plaintiffs found out that they did not have title to the disputed property. Plaintiffs' use of the disputed property was not permissive. The trial court did not err in finding that plaintiffs' use was hostile and under claim of right.

V. Use of Disputed Property

Defendant next argues that plaintiffs' uses, activities or improvements on the adjacent lake, rather than plaintiffs' use of the actual disputed property, cannot be considered in determining whether adverse possession is proper. Although defense counsel raised this issue, it does not appear from the record that the trial court addressed it. Thus, it is not properly preserved for appellate review. *Camden, supra* at 400 n 2. Once again, however, we briefly discuss the issue.

Generally, all relevant evidence is admissible, and irrelevant evidence is not. MRE 402, *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 188-189; 600 NW2d 129 (1999). Evidence is relevant if it has any tendency to make the existence of a fact, which is of consequence to the action more probable or less probable than it would be without the evidence. MRE 401. Uses, activities or improvements by plaintiffs on the lake, or on the property adjacent to the lake, are relevant to and can be considered in making a determination regarding adverse possession since it is evidence tending to support plaintiffs' claim. There is no indication in the

record that the court considered any activities by plaintiffs that took place solely in the lake (e.g., swimming), but rather, it considered evidence of plaintiffs' use of the disputed property, which was adjacent to the lake. It was not error for the trial court to consider uses, activities and improvements by plaintiffs on the portion of the lake adjacent to the property.

VI. View of Property

Finally, defendant argues that the trial court abused its discretion in denying defendant's request that the court view the disputed property. We disagree. This Court reviews the trial court's decision whether to view the scene for an abuse of discretion. *Gorelick v Dep't of State Hwy*, 127 Mich App 324, 335; 339 NW2d 635 (1983).

MCR 2.513(B) provides:

> On application of either party or on its own initiative, the court sitting as trier of fact without a jury *may* view property or a place where a material event occurred. [Emphasis added.]

As plaintiffs' correctly point out, the language of MCR 2.513(B) is permissive. The trial court was not required to view the property, but rather, had the discretion to decide whether to do so. In response to defendant's request, the trial court explained that it had seen numerous exhibits depicting the scene, including an exhaustive video of the disputed property provided by defendant, thirty-four pictures of the disputed parcel from various angles and from different years, and two surveys of the land. The trial court stated that it was satisfied, based on that evidence, that it had a "really good idea" of what the situation was like out on the property. The trial court further noted that if it thought that it needed to go out and see the property, it would do so whether it was convenient or not. The trial court's decision to not to view the property was a reasonable exercise of discretion in the interests of avoiding the presentation of cumulative evidence or wasting time. MRE 403.

Affirmed.

/s/ Jessica R. Cooper
/s/ William B. Murphy
/s/ Kirsten Frank Kelly